

Dr Iain Scobbie:

Address:

Department of Law, University of Dundee,
Dundee, Scotland, UK DD1 4HN

Phone:

(44).(0)382.23181

Fax:

(44).(0)382.26905

Position:

Lecturer in Law - specialising in public international law and legal theory.

Degrees:

LLB(Hons) (Edinburgh:1981), LLB (Cambridge:1982),
Graduate Diploma in International Law (Australian
National University: 1984), PhD (Cambridge: 1990 -
dissertation title, "Legal reasoning and the judicial
function in the Interantional Court")

Interests:

International judicial mechanisms, especially the
International Court; aspects of the laws of war;
international economic law; theories of legal reasoning.

Current projects:

the effect of armed conflict on treaties; procedural aspects
of the East Timor litigation; belligerent occupation and
natural resource law (currently embryonic)

Various publications (extant or forthcoming) in various journals and books.

Platform activities which might be developed and in which I am interested:

Procedural aspects of the litigation before the International Court; enforcement of
the merits decision (and of any interim measures order) both internationally and in
domestic courts; and the effect of Indonesian belligerent occupation on natural
resource questions; international institutional aspects of East Timor.

**The Timor Gap Treaty case:
the implications of procedure for litigation strategy**

**Dr Iain Scobbie
Faculty of Law, University of Dundee
Dundee, Scotland
UK DD1 4HN**

**07.xi.91 draft version
Not for quotation**

Abstract:

This draft paper does not claim to offer a comprehensive analysis of the potential procedural problems which the Portuguese application in the Timor Gap Treaty case might encounter. Rather it simply outlines the principal arguments which Australia might raise in preliminary objections proceedings: namely, that Portugal lacks capacity to bring the claim; that it lacks standing to do so; and that because the claim impleads Indonesian interests it must be dismissed on the basis of the Monetary gold doctrine. An indication is also given of the effect which the Rehabilitation of phosphate lands (Nauru v Australia) case might have on the Timor Gap Treaty proceedings.

**The Timor Gap Treaty case:
the implications of procedure for litigation strategy**

07.xi.91 draft

Dr Iain Scobbie
University of Dundee

The Timor Gap Treaty case (Portugal v Australia) raises inherent procedural complications which must be kept to the forefront in the preparation of the Portuguese case. Although the application directly impleads only two States as parties, Portugal and Australia, Portugal is acting to protect the rights of another territorial entity - namely East Timor. The case may also be seen to impinge upon the interests of Indonesia and, further, the activities of the United Nations are entangled in the claim. As a result, the opportunities available to Australia to argue for the rejection of the case in a preliminary objections phase before the merits are even considered are such that the litigation strategy adopted must be tailored to take account of the procedural problems faced by Portugal.

The indirect involvement of East Timor and Indonesia could conceivably raise acute procedural problems. Although the rights of East Timor may be subsumed within those of Portugal, Australia could base a possible preliminary objection on the nature of the Portuguese/East Timor relationship. Leaving this to one side for a moment, the crucial issue is that of Indonesian interests. This is the source of the procedural complexities which potentially could act to dismiss the Portuguese claim through the application of the Monetary gold doctrine¹. It is possible to avoid this outcome, although much depends on the strategy adopted in the presentation of the case. These difficulties would disappear if Indonesia were to intervene in the case under Article 62 of the Statute of the International

¹Monetary gold removed from Rome in 1943 case: preliminary objections judgment 1954 ICJ Repts 19.

Court of Justice². However, as Indonesian interests are best served by remaining aloof from the proceedings, it must not be presumed that such intervention will occur³.

Portuguese capacity to bring the claim:

In an attempt to divest the International Court of jurisdiction over the case, Australia could mount an argument similar to that employed by the United States in US nationals in Morocco⁴. France brought this case against the United States, invoking their concordant declarations under Article 36.2 of the Statute of the Court as jurisdictional title. The United States raised a preliminary objection, arguing that the French application did not identify unequivocally the parties to the case other than the United States, and claiming that it was not clear whether France had filed the case on its own behalf; whether it had filed the claim as Protector of Morocco on behalf of Morocco; or whether it had brought the claim on its own behalf and also as Protector on behalf of Morocco. The United States' preliminary objection noted that France had refused to clarify this matter and accordingly claimed that the French application failed to fulfil the requirements of Article

²Whether Indonesia could intervene under Article 63 of the Statute is an interesting but complex question which is beyond the scope of this paper.

³Another possibility would be if Indonesia were to make known its views to the Court without formally intervening. This method of presenting information was a crucial element in the disposal of the Corfu Channel: merits judgment and Norwegian fisheries cases. On the former, see Bartos M, L'intervention yougoslave dans l'affaire du Détroit de Corfou, 14 Comunicazioni e studi 41 (1975). This point cannot be addressed in this draft, but should be borne in mind.

⁴Case concerning rights of nationals of the United States of America in Morocco 1952 ICJ Repts 176.

40.1 of the Statute and Article 32 of the 1946 Rules of Court⁵. The United States continued that it desired an exact identification of the parties to be made in order to identify in advance which States would be bound by the Court's judgment in the case, and in particular the capacity in which France acted:

My Government is concerned that the State of Morocco and also the French Republic, both in its own right and capacity and as Protector of Morocco, should be bound by the judgment of the Court in determining the rights of American nationals in Morocco. My Government refers in this connection to Article 59 of the Statute of the Court, which provides:

"The decision of the Court has no binding force except between the parties and in respect of that particular case."⁶

⁵Article 40.1 of the Statute provides:

"1. Cases are brought before the Court, as the case may be, either by the notification of the special agreement or by a written application addressed to the Registrar. In either case the subject of the dispute and the parties shall be indicated."

Article 32.2 of the 1946 Rules provided:

"2. When the case is brought before the Court by means of an application, the application must, as laid down in Article 40, paragraph 1 of the Statute, indicate the party making it, the party against whom the claim is brought, and the subject of the dispute..."

The corresponding article of the current Rules of Court (1978), Rule 38.1, is identical in substance to the part of 1946 Rule 32.2 quoted above.

For a comprehensive commentary to this aspect of the Rules of Court, see Guyomar G, Commentaire du règlement de la Cour Internationale de Justice adopté le 14 avril 1978: interprétation et pratique (Pedone: Paris: 1983) 229 et seq.

⁶US nationals in Morocco Pleadings Vol I, 235-238: quotation at 236-237.

Scobbie: The Timor Gap Treaty case

The French observations to the preliminary objection failed to clarify the question of Moroccan participation⁷ whereupon the Court intervened and requested France to state whether it acted in both its own and Morocco's behalf⁸. In response to this, France stated unequivocally that it was acting both in its own account and as the Protecting Power of Morocco, and that the Court's judgment would be binding on both France and Morocco⁹. On the basis of this understanding, the United States withdrew its preliminary objection: the dual procedural role of France was recorded in the discontinuance order and the matter noted in the final judgment¹⁰.

Accordingly, it is possible that Australia might try to raise a preliminary objection on the ground that it is not clear whether Portugal is acting solely in its own capacity, or on behalf of East Timor, or on behalf of both in the Timor Gap Treaty case¹¹. US nationals in Morocco gives some guidance in this matter, but Australia might try to re-

⁷US nationals in Morocco Pleadings I 248-255. The United States made clear its dissatisfaction with the French observations in a letter dated 16 August 1951 sent by its Agent to the President of the Court - see Pleadings II 424-426.

⁸Letter dated 04 October 1951 from the Registrar to the French Agent, Pleadings II 431-432.

⁹Letter dated 06 October 1951 from the French Agent to the Registrar, Pleadings II 432-433.

¹⁰See letter dated 22 October 1951 from the United States Agent to the Registrar, Pleadings II 434; 31:10:1951 (discontinuance) Order 1951 ICJ Repts 109 at 110; and US nationals in Morocco 1952 ICJ Repts 176 at 179.

¹¹In the context of such a procedural argument, East Timor should be understood territorially, as the non-self governing territory which constitutes a self-determination unit, rather than as the people of East Timor.

conceptualise the issue by arguing that a non-State entity, such as East Timor, cannot be bound by the judgment in the case.

Such an argument might take the following form: in US nationals in Morocco, France, although acting on behalf of Morocco as its Protecting Power, recognised that Morocco retained its personality as a State under international law¹². Thus the precedent afforded by US nationals is of no avail in the instant case because of the inter-relationship between Articles 34 and 59 of the Statute of the Court. Article 34.1 provides "Only States may be parties in cases before the Court" whereas Article 59 provides that the decision of the Court has no binding force "except between the parties and in respect of that particular case". Accordingly, to be a "party" to a case for the purposes of res judicata, an entity must be a "State" - which East Timor manifestly is not. Australia could claim that this argument had especial force in the instant case because Portugal has stated in its Application that:

It is moreover in that legal capacity, as the administering Power of the Territory of East Timor, by virtue of which it has the duties and powers necessary to the accomplishment of its international public service, that Portugal is filing the present Application, thereby acting on behalf of and in the interest of the people of East Timor and at the same time on its own behalf (in so far as Portugal has the right to discharge its responsibilities to that people and to the international community).¹³

Therefore Australia might argue that no adjudicative determination can be made of East

¹²See US nationals in Morocco 1952 ICJ Repts 176 at 185.

¹³Application instituting Proceedings, filed 22 February 1991, para 14, pp9-11.

Timor's interests before the International Court as any such decision would produce a fundamental inequality inasmuch as Australia would be bound by the decision but not East Timor¹⁴.

Although those presenting the Portuguese case should be prepared for such an argument, its force is illusory: the correct position appears to be that, regardless of the formal terms of Articles 34 and 59 of the Statute, they do not combine to prevent the indirect participation of a non-State territorial entity, or the adjudication of its interests, providing that the primary participation is undertaken by the State which bears international responsibility for that entity¹⁵. If this is not clearly established by virtue of the US nationals in Morocco litigation, it is established by the Minquiers and Ecrehos case

¹⁴An additional or alternative argument based on this hypothesis might be that it would be an abuse of process for the Court to render a decision because this could have no true object or operative effect, relying on the precedents afforded by Northern Cameroons 1963 ICJ Repts 15 and the Nuclear tests cases (Australia v France; New Zealand v France) 1974 ICJ Repts 253, 457. However, the formulation of the submissions in the Portuguese application would appear to obviate such an argument.

¹⁵The converse of this also applies: a State may be sued for actions attributable to it but committed by or on behalf of a territorial entity for which it bears international responsibility. This is indicated by Nationality decrees in Tunis and Morocco (1923) PCIJ.B:4 (although formally an advisory opinion, this bore directly on a dispute between Britain and France in its capacity as the Protecting Power of both Tunis and Morocco - see PCIJ.B:4 27-28, and the pleadings, PCIJ.C:2 52-54); the Mavrommatis Palestine Concessions litigation, preliminary objections judgment (1924) PCIJ.A:2, merits judgment (1925) PCIJ.A:5, and readaption judgment (1927) PCIJ.A:11; Oscar Chinn (1934) PCIJ.A/B:63; and Phosphates in Morocco (1938) PCIJ.A/B:74. The Chinn case would appear to afford the closest analogy with the instant case.

Scobbie: The Timor Gap Treaty case

(United Kingdom and France)¹⁶. Rosenne notes that the interested party in this case was not the United Kingdom but Jersey, which had formally agreed to the submission of the case and which was distinctly represented in the proceedings before the International Court by its Attorney-General, on the ground that it was "directly affected" by the decision¹⁷.

In the instant case, Portugal's capacity to act on behalf of East Timor, as the State which bears international responsibility for the territory, is supported by Security Council resolution 384 (1976), operative paragraph 3 of which:

Calls upon the Government of Portugal as administering Power to co-operate fully with the United Nations so as to enable the people of East Timor to exercise freely their right to self-determination.

In the Namibia advisory opinion¹⁸, the International Court had to consider the validity of General Assembly resolution 2145, which purportedly terminated the Mandate held by

¹⁶Minquiers and Ecrehos 1953 ICJ Repts 47.

¹⁷See Rosenne S, The World Court: what it is and how it works, (Sijthoff: Leiden/Oceana: Dobbs Ferry: 1973, 3rd edn) 142; Minquiers and Ecrehos Pleadings II 20-21, 146.

On "States" and article 34 of the Statute, see also Higgins R, The development of international law by the political organs of the United Nations (Oxford UP: London: 1963) 48-50; Rosenne S, The law and practice of the International Court of Justice (Sijthoff; Leiden: 1965) 267 et seq, especially at 281-282; and Rosenne, Reflections on the position of the individual in inter-State litigation in the International Court of Justice, in Sanders P (Ed), International arbitration: liber amicorum for Martin Domke (Nijhoff: The Hague: 1967) 240 at 242.

¹⁸Legal consequences for States of the continued presence of South Africa in Namibia (South West Africa) notwithstanding Security Council resolution 276 (1970) advisory opinion 1971 ICJ Repts 16.

South Africa over South West Africa. The Court ruled:

Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned.¹⁹

This lends some support to the view that the classification by the Security Council of Portugal as the Administering Power of East Timor in resolution 384 is a matter which cannot be called into question by Australia. However the ruling in Namibia referred to "decisions taken by the United Nations organs concerned": resolution 384 does not specify under which Article or Chapter of the Charter it was taken, and the presumption must be that it has the character of a recommendation, and not a decision²⁰. Accordingly it falls outside the strict parameters of the Court's refusal to assume powers of judicial review. However, the precise legal nature of resolution 384 may not be determinant, especially as Portugal has been described by other United Nations organs as the Administering Power of East Timor²¹

Apart from the Namibia ruling, there are other reasons to argue that the International Court should be expected not to diverge from the United Nations

¹⁹Namibia advisory opinion 1971 ICJ Repts 16 at 45, para 88.

²⁰The opposite view appears to be taken in the Portuguese application of 22 February 1991 which argues that Australia has failed to fulfil its obligations under Article 25 of the Charter - see para 30, p17 and submission 2.c, p19. Article 25 only obliges United Nations members to "accept and carry out the decisions of the Security Council".

²¹See para 12, p9 of the Portuguese application.

identification of Portugal as the Administering Power of East Timor²². The principal argument is reliant on Monetary gold, thus illustrating clearly the double-edged nature of the doctrine which may be drawn from this case in that it may be seen to work to Portugal's benefit on organisational issues, but yet present a potential bar to the adjudication of the merits of the claim which can only be circumscribed with great caution.

Before considering the dual aspect which Monetary gold presents in this case, it would be as well to consider another preliminary objection which Australia might feasibly raise - while conceding that Portugal possesses a jurisdictional title sufficient to bring the case²³ Australia might argue that the claim is inadmissible because Portugal lacks locus standi. It might be possible to dismiss this argument, or at the very least have it joined to the merits, simply by reference to the distinction drawn in Barcelona Traction²⁴ between obligations which are owed to the international community as a whole, and those arising bilaterally in the field of the diplomatic protection of nationals:

²²There may be issues arising here as a result of the institutional integration of the International Court into the United Nations structure as principal judicial organ. Any such implications have been ignored for the purposes of the present draft.

²³Portugal has cited as jurisdictional title the concurrent declarations made by it and Australia under Article 36.2 of the Statute of the International Court - see Application para 4, p5. The declarations are reproduced in 1989-1990 Yearbook of the International Court of Justice 62 (Australia) and 90 (Portugal).

²⁴Barcelona Traction, Light and Power Co Ltd case: second phase, final judgment 1970 ICJ Repts 3.

Scobbie: The Timor Gap Treaty case

By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.

The International Court identified obligations which arose from basic human rights principles and rules as falling into this category²⁵. Given the existence of an ^{un}equivocal jurisdictional link between Australia and Portugal, the Court's qualification of this ruling later in the same case is irrelevant²⁶, although the burden would lie on Portugal to persuade the Court either that the East Timorese rights it had impleaded were of an erga omnes nature, or that Portugal had a special interest in the situation sufficient to bring the claim.

However, all the arguments which support the Portuguese capacity to present the claim would be of no avail if Australia were able to argue successfully that the basis of the claim offends against the Monetary gold doctrine. This would require the Court to dismiss the case in order to protect Indonesian interests. On the other hand, this doctrine has the potential to act to Portugal's advantage by isolating from attack its recognition by the relevant United Nations organs as the proper Administering Power of East Timor.

The Monetary gold doctrine:

Although the Monetary gold doctrine is often discussed in terms of an exercise of judicial

²⁵Barcelona Traction 1970 ICJ Repts 3 at 33, paras 34 and 35.

²⁶See Barcelona Traction 1970 ICJ Repts 3 at 47, para 91.

propriety rather than as a jurisdictional matter²⁷, reliance on propriety appears to be misplaced. In principle the existence of a jurisdictional title is a matter inter partes, but this presupposes that the parties are able to confer jurisdiction on the Court over the specific case in issue in the first place. This appears to be the essence of the doctrine²⁸ as the Court made a formal finding that it possessed jurisdiction, but then refused to exercise it on the basis of a distinction drawn between jurisdiction per se and whether the jurisdiction conferred empowered it to discharge the task thereby entrusted to it²⁹.

As may be recalled, this case was filed in an attempt to determine the destination of approximately 2,500 kg of gold which had been seized by Germany in Rome in 1943 which had been the property of the National Bank of Albania. Monetary gold found in Germany after the war was entrusted for redistribution to a Tripartite Commission comprising the French, United Kingdom and United States governments. In January 1945, Albania enacted legislation which confiscated without compensation the assets of the National Bank of Albania, 88.5% of the share capital of which was the property of the

²⁷Compare, for instance, Rosenne S, The law and practice of the International Court (Sijthoff: Leiden: 1965, 2 vols) 308-309; Shihata IFI, The power of the International Court to determine its own jurisdiction: compétence de la compétence (Nijhoff: The Hague: 1965) 233-235; contra Lauterpacht H, The development of international law by the International Court (Stevens: London: 1958) 94-95, 342-343; and Gross L, Limitations upon the judicial function, 58 American Journal of International Law 415 (1964) 424.

²⁸For the purposes of this paper, only the core of the Monetary gold doctrine is under consideration and not all of its diverse manifestations in the jurisprudence and practice of the International Court. Some simplification is accordingly to be expected.

²⁹Monetary gold removed from Rome 1954 ICJ Repts 31.

Italian State³⁰. The Tripartite Commission submitted to arbitration the question whether the gold removed from Rome belonged to Italy, Albania or neither. The arbitrator ruled that when the gold was seized, it had belonged to Albania. A consequential competing claim, foreseen by the Commission, then arose. Although the gold belonged to Albania, Italy claimed it as partial compensation for the injury resulting from the expropriation of the National Bank of Albania, whereas the United Kingdom claimed the gold as partial satisfaction for the award made by the International Court against Albania in the Corfu Channel case³¹. It was in an attempt to decide this issue - whether the destination of the gold was to Italy or the United Kingdom - that proceedings were instituted before the International Court³².

Faced with this situation, the Court first ruled that the parties before it had conferred jurisdiction on it to deal with the questions submitted in the Application, but held that this was not co-extensive with the task it was called upon to perform:

The Court is not called upon merely to say whether the gold should be delivered to Italy or to the United Kingdom. It is requested to determine first certain legal

³⁰For an account of the facts, see Monetary gold 1954 ICJ Repts 19 at 25-27; the Italian Application instituting Proceedings, Pleadings 8-15; and the statement of facts contained in the 1953 arbitral award delivered by Sauser-Hall regarding ownership of the gold, reproduced as Annex 5 to the Italian Statement on the Preliminary Question, Pleadings 24, 38 at 45-51.

³¹Corfu Channel case: compensation judgment 1949 ICJ Repts 244.

³²This somewhat simplified account is sufficient for the purposes of this paper. Procedurally the case was more complex than this account suggests.

questions upon the solution of which depends the delivery of the gold.³³

The logically prior question which fell for decision was whether Italy was entitled to receive the gold as the result of an international delict which had been committed by Albania for which compensation was due:

To go into the merits of such questions would be to decide a dispute between Italy and Albania.

The Court cannot decide such a dispute without the consent of Albania. But it is not contended by any Party that Albania has given her consent either expressly or by implication. To adjudicate upon the international responsibility of Albania without her consent would run counter to a well-established principle of international law embodied in the Court's Statute, namely, that the court can only exercise jurisdiction over a State with its consent.³⁴

The Monetary gold doctrine encompasses an associated res judicata point to which we shall return, but its implications for the Portuguese case are manifest. The claim must not be presented in such a way as to implead directly questions of Indonesia's international responsibility. Although the submissions contained in the Application appear to avoid any such issues³⁵, it can only be expected that Australia, in a preliminary objections phase, will attempt to reformulate the matters in issue in such a way as to bring it within the scope of the Monetary gold doctrine.

The current scope of the Monetary gold doctrine:

³³Monetary gold 1954 ICJ Repts 31.

³⁴Monetary gold 1954 ICJ Repts 32.

³⁵See Portuguese Application, para 34, pp17-21.

Scobbie: The Timor Gap Treaty case

Subsequent cases have modified the doctrine to some extent. The issue whether other States' interests were so affected a suit that it could not proceed without their participation was raised as an objection to both jurisdiction and admissibility by the United States in the Nicaragua proceedings. The States concerned were identified as Costa Rica, El Salvador and Honduras. The jurisdiction objection arose because of the Vandenberg reservation in the United States' declaration made under Article 36.2 of the Statute. This objection was joined to the merits in the preliminary objections phase³⁶. The corresponding admissibility objection had a dual character, and could be:

considered as a legal bar to adjudication or as "a matter requiring the exercise of prudential discretion in the interest of the integrity of the judicial function".³⁷

The United States argument was that the adjudication of the Nicaraguan claim would "necessarily implicate the rights and obligations of other States", in particular Honduras, and would "necessarily involve the adjudication of the rights of third States" with regard to any action which they had taken under Article 51 of the United Nations Charter. The United States claimed that this could not be done without the consent and participation of those States. Nicaragua denied that the Court's jurisprudence had endorsed an "indispensable parties" doctrine sufficient to terminate proceedings if these States were

³⁶Military and paramilitary activities in and against Nicaragua case: jurisdiction and admissibility judgment 1984 ICJ Repts 392: joinder of the jurisdictional objection to the merits was ordered at para 76, pp425-426, see paras 67-76, pp421-426. The Vandenberg reservation is also known as the multilateral treaty reservation.

³⁷Nicaragua case: jurisdiction and admissibility judgment 1984 ICJ Repts para 84, p429.

absent, and emphasised that it had formulated claims against only the United States³⁸.

The Court rejected this objection to the admissibility of the case, and affirmed the continued validity of the Monetary gold doctrine, ruling:

There is no trace, either in the Statute or in the practice of international tribunals, of an "indispensable parties" rule of the kind argued for by the United States, which would only be conceivable in parallel to a power, which the Court does not possess, to direct that a third State be made a party to proceedings. The circumstances of the Monetary Gold case probably represent the limit of the power of the Court to refuse to exercise its jurisdiction; and none of the States referred to can be regarded as in the same position as Albania in that case, so as to be truly indispensable to the pursuance of the proceedings.³⁹

Although this preserved an apparently unreconstructed Monetary gold doctrine, it is possible to interpret this ruling as glossing the doctrine, such that its operation is triggered only when a third State is an "indispensable party" - in other words, when its legal interests constitute the essence of the proceedings.

Such a gloss clearly emerges from the unanimous judgment of a Chamber of the Court which ruled upon the Nicaraguan application to intervene under Article 62 of the

³⁸Nicaragua case: jurisdiction and admissibility judgment 1984 ICJ Repts para 86, p430: see also para 87, pp430-431.

³⁹Nicaragua case: jurisdiction and admissibility judgment 1984 ICJ Repts para 88, p431. The Court also adverted to res iudicata which, as has been noted, will be considered in due course. It is possible to argue that the Court was being disingenuous when making this ruling given its practice - and indeed that of other tribunals - in certain maritime delimitation cases. Discussion of this point is beyond the scope of this draft.

Statute⁴⁰ in the Frontier dispute (El Salvador/Honduras) case⁴¹. Again the Court upheld the continued validity of the Monetary gold doctrine⁴² but also restricted its scope. The Court contrasted the phrase "interest of a legal nature", used in Article 62 of the Statute, with "the very subject-matter of the decision", the operative phrase employed in Monetary gold. It held that the former was "a less stringent condition"⁴³. Accordingly, for the doctrine to operate, it is insufficient that the legal interests of a third State "may be affected by the decision in the case", rather these must form the focal point of the case⁴⁴. Whether this interpretation of the doctrine is sufficient to block any Australian claims that it should operate to protect Indonesian interests can only really be gauged once a more extensive account is given of the detail of the Portuguese arguments.

Res judicata:

⁴⁰Article 62 of the Statute provides:

1. Should a State consider that it has an interest of a legal nature which may be affected by the decision in the case, it may submit a request to the Court to be permitted to intervene.
2. It shall be for the Court to decide upon this request.

⁴¹Land, island and maritime frontier dispute case: Nicaraguan application for permission to intervene judgment 1990 ICJ Repts 92.

⁴²Frontier dispute case: Nicaraguan intervention judgment 1990 ICJ Repts paras 52-56, pp114-116.

⁴³Frontier dispute case: Nicaraguan intervention judgment 1990 ICJ Repts para 56, p116 - see also para 73, p122.

⁴⁴This distinction was at least latent in Monetary gold: see 1954 ICJ Repts 32.

As indicated by the US nationals in Morocco proceedings, one of the issues which has arisen when a non-State entity has been involved in a case is whether the judgment can be binding on it by virtue of Article 59 of the Statute of the International Court. Although this point may be discarded as unlikely to succeed, a more potent variation of a res judicata argument may be available to Australia to raise as a preliminary objection. This argument is associated with the Monetary gold doctrine, but also has arisen in cases involving intervention under Article 62 of the Statute. As should be clear from the last section, there is a relationship between these two procedural issues.

In Monetary gold, the Court was faced with the argument that any judgment it rendered would be binding only upon the States before the Court, but not on Albania. It dismissed the relevance of this point:

It is true that, under Article 59 of the Statute, the decision of the Court in a given case only binds the parties to it and in respect of that particular case. This rule, however, rests on the assumption that the Court is at least able to render a binding decision. Where, as in the present case, the vital issue to be settled concerns the international responsibility of a third State, the Court cannot, without the consent of that third State, give a decision on that issue binding upon any State, either the third State, or any of the parties before it.⁴⁵

Article 59 also formed part of the Court's justification for rejecting the United States' "indispensable parties" argument in the Nicaragua case: jurisdiction and admissibility judgment:

Where...claims of a legal nature are made by an Applicant against a Respondent in proceedings before the Court, and made the subject of submissions, the Court has

⁴⁵Monetary gold 1954 ICJ Repts 33.

in principle merely to decide upon those submissions, with binding force for the parties only, and no other State, in accordance with Article 59 of the Statute.⁴⁶

A similar view was adopted in the judgment concerning Nicaragua's application to intervene in the Frontier dispute case where, referring back to Monetary gold, the

Chamber stated:

as was to be expressly stated in a later Judgment, a State which considers that its legal interest may be affected by a decision in a case has the choice, to intervene or not to intervene; and if it does not, proceedings may continue, and that State is protected by Article 59 of the Statute.⁴⁷

If Australia is unable to block proceedings by use of the Monetary gold doctrine, it may yet mount a subsidiary argument based on the issue of res judicata. Australia might argue that the inevitable consequence of a decision in favour of Portugal would be that the Timor Gap Treaty⁴⁸ would be a nullity. On the basis of previous jurisprudence, Australia would be bound by the decision of the Court under Article 59 but Indonesia would not.

⁴⁶Nicaragua case: jurisdiction and admissibility judgment 1984 ICJ Repts para 88, p431.

⁴⁷Frontier dispute case: Nicaraguan intervention judgment 1990 ICJ Repts para 54, p115. The case which the Court cited as authority for this ruling was the Continental shelf (Libya/Malta) case: application by Italy for permission to intervene judgment 1984 ICJ Repts 3 at para 42, p26. This ruling was stringently criticised by three dissenting judges - see 1984 ICJ Repts, Oda: dissent para 9, p94; Schwebel: dissent paras 9-11, pp134-135; and Jennings: dissent paras 27-34, pp157-160.

⁴⁸11.xii.1989 Australia/Indonesia Treaty on the Zone of Co-operation in an area between the Indonesian Province of East Timor and Northern Australia, reproduced 29 International Legal Materials 469 (1990).

Accordingly, although Australia would be obliged to take the view that the treaty had no force or effect, Indonesia would be able to hold that its legal existence was unaffected by the decision. As the Treaty establishes a joint venture zone⁴⁹ and thus requires the co-operation of the parties in its execution, Australia might argue that either the Monetary gold doctrine serves to dismiss the case or Article 59 would fail to insulate Indonesia from the effects of the judgment. If the latter, then Australia could claim that such an extension of res judicata would require the Court, in giving judgment, to breach Article 59 of the Statute. In itself, this could be presented as a sufficient reason for the Court to declare the case inadmissible⁵⁰.

A possible counter-argument might be for Portugal to argue that any such difficulties are extraneous to the case before the Court because they are properly connected with post-adjudicative matters. It is a settled point in the jurisprudence of the Court that its function is to decide only the issues which are before it, and not to concern itself with contingent post-adjudicative matters⁵¹.

⁴⁹See article 2.2 of the Treaty.

⁵⁰Compare Free zones of Upper Savoy and Gex case: 19.viii.1929 Order (1929) PCIJ.A:22 13, and Free zones judgment (1932) PCIJ.A/B:46 161-162.

⁵¹This is perhaps most clearly seen in the Nuclear tests case (Australia v France) 1974 ICJ Repts para 56, p271 read in conjunction with para 60, p272. It is also apparent in the Minority schools case (1928) PCIJ.A:15 34-35, and may be subsumed within the principle that bad faith cannot be presumed by the Court - see Free zones case: 06.xii.1930 Order (1930) PCIJ.A:24 12, and Free zones judgment (1932) PCIJ.A/B:46 167. The post-adjudicative issues which would arise following a decision adverse to Australia in the Timor Gap Treaty case are myriad: apart from any question of enforcement by the United Nations, there could also arise the

The recursive nature of Monetary gold - United Nations action:

It was stated earlier that, apart from any support which might be drawn from the International Court's refusal in Namibia to assume powers of judicial review over decisions of United Nations organs, Monetary gold might operate to protect the identification of Portugal as Administering Power of East Timor from challenge. This argument is not apparent on the face of the case but relies on an interpretation of the Northern Cameroons case⁵². As this argument is essentially interpretative, its force or persuasiveness cannot be easily assessed.

Given that qualification, the argument proceeds in the following way⁵³ - in Northern Cameroons, the Court refused to enter into the merits of the claim which Cameroun had presented on the ground that it would be impossible to deliver a judgment capable of effective application⁵⁴. However, it is possible to interpret the case as structured around two issues which are barely mentioned in the judgment - on an analogy with Monetary gold, the interests of both Nigeria and the General Assembly were at stake in the case. The judgment never refers to Monetary gold, and yet it is based on a finding which is redolent of that doctrine:

possibility of enforcement in domestic courts - for instance, in "hot oil" cases. Unfortunately these questions cannot be discussed in this paper.

⁵²Northern Cameroons case 1963 ICJ Repts 15.

⁵³Once again it must be said that this is part of a more complex argument, the full exposition of which goes beyond the confines of this draft.

⁵⁴See Northern Cameroons 1963 ICJ Repts 31-38, especially at 34 and 37-38.

even if the Court, when seised, finds that it has jurisdiction, the Court is not compelled in every case to exercise that jurisdiction. There are inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore. There may thus be an incompatibility between the desires of an applicant, or, indeed, of both parties to a case, on the one hand, and on the other hand the duty of the Court to maintain its judicial character. The Court itself, and not the parties, must be the guardian of the Court's judicial integrity.⁵⁵

Leaving to one side the Nigerian interests in the case⁵⁶, in its judgment, the Court noted that Cameroun had stated that it did not ask the Court to revise or reverse the decision of the General Assembly to integrate the Trust Territory of Northern Cameroons into Nigeria. Accordingly the Court refused to consider whether it was competent to do so, but it recorded that Cameroun had asked for rulings which were at variance with the conclusions which had been reached by the General Assembly⁵⁷.

The pleadings had dealt extensively with the import of the Cameroun application on United Nations' interests, in particular those of the General Assembly and Trusteeship Council. From the outset, the United Kingdom had argued that it, as Administering Authority of the Trust Territory of Northern Cameroons, was not the proper destination of complaints made by Cameroun regarding the administration and supervision of the Territory. Rather, by virtue of Article 75 of Charter, responsibility for administration and supervision lay with the United Nations, which was the proper forum for members'

⁵⁵Northern Cameroons 1963 ICJ Repts 29.

⁵⁶The respondent (the United Kingdom) invoked Monetary gold expressly to protect Nigerian interests - see Pleadings 308, 396-397 and (implicitly) 398-399.

⁵⁷Northern Cameroons 1963 ICJ Repts 32-33.

complaints⁵⁸. Further it argued that Cameroun was simply attempting to re-open a question which had been settled by the General Assembly, and thus have that action judicially reviewed. The core of this argument was that if individual United Nations members were capable of utilising the Court in this way, then this would disrupt the finality of decisions taken by the General Assembly⁵⁹.

Cameroun responded to this argument by drawing a distinction between the nature of the trusteeship supervisory functions exercised by the General Assembly and by the International Court. It claimed that the General Assembly operated in the realm of politics whereas the Court determined legal issues, relying on the dichotomy drawn in the 1966 South West Africa cases⁶⁰ between administrative supervision and judicial protection. Cameroun continued that just as judicial protection was the ultimate protection against violations of the mandate system⁶¹, so it was for the trusteeship, because the political nature of General Assembly supervision could sacrifice legal rights for political expediency⁶².

The United Kingdom declared this dichotomy to be irrelevant because United Nations political organs took all aspects, including the legal aspects, into account when

⁵⁸See Pleadings 56-57, 61-62 and 287-288.

⁵⁹See Pleadings 60, 62-63, 284, 293, 375, 395 and 399.

⁶⁰South West Africa cases 1962 ICJ Repts 319 at 336, 344.

⁶¹Relying on South West Africa cases 1962 ICJ Repts 336.

⁶²Pleadings 191, 200, 204-206, 209, 228, 342-343 and 351-366.

dealing with a dispute⁶³. The United Kingdom also re-introduced its finality of decisions argument in another form: it argued that because only it and the United Nations were party to the Trusteeship Agreement, they alone could terminate it. Termination precluded any individual United Nations member from raising issues regarding the administration of the territory before the Court⁶⁴.

The finality of decisions argument employed by the United Kingdom is at least analogous to the Monetary gold doctrine. Individual United Nations members do not possess the capacity to claim judicial review from the International Court over internal matters with which they are dissatisfied. The Court, while refusing to rule on the claims presented, nevertheless indicated that it agreed with the arguments led by the United Kingdom. It stated that its role was not the same as that of the General Assembly, and that General Assembly decisions would not be reversed by any judgment it could deliver. Moreover, under Article 59 of the Statute, its judgment would not be binding on Nigeria, any other State, or on the United Nations⁶⁵.

If this interpretation of Northern Cameroons, made in the light of the pleadings, is tenable, then there is a basis to argue forcefully that Australia cannot challenge the designation by the United Nations of Portugal as the Administering Power of East Timor in the proceedings currently before the International Court⁶⁶.

⁶³Pleadings 378.

⁶⁴Pleadings 379-380.

⁶⁵Northern Cameroons 1963 ICJ Repts 33: see also 34-36.

⁶⁶There may also be an argument to this effect flowing from general principles of international institutional law.

Some residual uncertainty:

At present it is a matter of speculation whether Australia will raise the preliminary objections outlined in this paper against the Portuguese application. Obviously a much closer analysis will be required of any objections which Australia actually chooses to raise. In particular, one factor serves to cloud the points covered in this paper - the outcome of the preliminary objections phase of the Rehabilitation of phosphate lands case (Nauru v Australia) which is pending before the Court. Whether the decision in the current phase of that case will have any impact on the Portuguese application is an open question.

Having said that, it is possible that this case may work in Portugal's interests⁶⁷. In the face of the Rehabilitation of phosphate lands case and the Timor Gap Treaty case, Australia might be placed in a quandry. The Nauru claim bears on the administration of the phosphate industry in the period 1919-1967, when the exploitation of phosphate on Nauru was controlled by a inter-governmental body which comprised the governments of

⁶⁷It might be possible for Portugal to intervene in the preliminary objections phase of this case under Article 62 of the Statute as a jurisdictional link exists. Nauru has brought the case under Article 36.2 of the Statute. All three States maintain 36.2 declarations which appear capable of supporting such a triangular action. However, it is possible that such an intervention would fail through lack of a sufficient legal interest which would be affected by the outcome of the case. The Court appears to be firmly set in its view that an interest in the "rules and principles" component of a case cannot satisfy this requirement - see, for instance, the Frontier dispute case: Nicaraguan intervention judgment 1990 ICJ Repts para 76, p124. Full discussion of this point, and of the strategic implications of such an intervention, are beyond the scope of this paper.

Scobbie: The Timor Gap Treaty case

Australia, New Zealand and the United Kingdom⁶⁸. The specific allegations made against Australia concern its treatment, as the responsible authority, of the island during its period as a Mandated and then as a Trust Territory⁶⁹. Manifestly, the preliminary objections phase of the Rehabilitation of phosphate lands case may determine further the scope of the application of the Monetary gold doctrine, but it could also clarify the status of United Nations decisions and actions in proceedings before the Court. Australia's dilemma is to argue both points not only in the light of the case in hand, but also while holding the Timor Gap treaty case to the forefront of its strategy.

⁶⁸See Nauru application filed 19.v.1991 Part II, and Part III, para 15.

⁶⁹See Nauru application, Part IV.